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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

FRANS ROODENBURG et al., Plaintiffs and Appellants, v. PAVESTONE COMPANY, L.P., Defendant and Appellant.	C055116 (Super. Ct. No. 02AS06389)

APPEAL from a judgment of the Superior Court of Sacramento County, Steven H. Rodda, Judge. Affirmed.

Cassinat Law Corporation and John E. Cassinat for Plaintiffs and Appellants.

Vlahos & Rudy, Michael B. McNaughton and Hanson Bridgett Marcus for Defendant and Appellant.

Plaintiffs Hokanson Building Block Company, Inc. (Hokanson), Hokanson's president and sole owner Frans Roodenburg

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of Parts I, IV, and V of the Discussion.

(Roodenburg), and defendant Pavestone Company, L.P. (Pavestone) formed a California limited liability company named Pavestone California LLC (Pavestone California). The operating agreement for Pavestone California appointed Roodenburg general manager and provided that, in the event Roodenburg was terminated or resigned for cause, Pavestone would purchase Hokanson's interest in the company for the value of Hokanson's capital account at the time plus a severance payment.

Nearly two years later, Roodenburg resigned as general manager of Pavestone California for cause. When the parties could not agree on the value of Hokanson's capital account, plaintiffs initiated this action alleging, among other things, breach of contract and breach of fiduciary duty. Following a jury trial, the court entered judgment for plaintiffs on the breach of contract claim in the amount of $543,040, which consisted of $143,040 for Hokanson's capital account and $400,000 for the severance payment. The jury found no breach of fiduciary duty. The court also awarded plaintiffs prejudgment interest in the amount of $489,550.56.

Pavestone appeals, contending the award of damages is inconsistent with the special verdict returned by the jury, which expressly found no breach of contract. Pavestone also challenges the award of prejudgment interest on several grounds.

Plaintiffs cross-appeal, claiming jury misconduct in connection with the verdict on the breach of fiduciary duty claim. Plaintiffs also contend the trial court erred in not awarding compound interest.

In the published portion of the opinion, we conclude plaintiffs are entitled to prejudgment interest on their breach of contract claim, notwithstanding that the amount of their claim was uncertain, because the contract between the parties provides for an award of prejudgment interest. We further conclude the prejudgment interest provision of the parties' contract is not a "forbearance" agreement within the meaning of the usury section of the California Constitution. Finally, we conclude plaintiffs failed to present any admissible evidence of jury misconduct in connection with their breach of fiduciary duty claim.

In the unpublished portion of the opinion, we conclude the trial court properly interpreted the jury's special verdict in awarding plaintiffs $543,040 on their breach of contract claim and properly declined to award plaintiffs' compound interest.

We reject each of the parties' contentions and affirm the judgment.

FACTS AND PROCEEDINGS

Prior to the formation of Pavestone California, Roodenburg was the sole owner of Hokanson, which operated a concrete block manufacturing facility in the Sacramento area. On January 1, 2000, Roodenburg, Hokanson and Pavestone entered into an operating agreement in order to establish the terms and conditions under which Pavestone California would operate (the Operating Agreement). Around this same time, they also entered

into a "Contribution Agreement" providing for the transfer of Hokanson's assets to Pavestone California.

Under the terms of the Operating Agreement, Pavestone owned 75 percent of Pavestone California and Hokanson owned 25 percent, with each sharing in profits and losses in the same proportion. The Operating Agreement named Pavestone as the managing member of the new company and Roodenburg as the general manager of "all operations," with such duties and responsibilities as delegated by the managing member.

The Operating Agreement created capital accounts for each member, with such accounts credited with any capital contributions by the member, any liabilities assumed by the member, and a share of any profits earned. The capital accounts were also debited with money or property distributed to the member, any member liabilities assumed by the company, and a share of any operating losses sustained.

Article 8 of the Operating Agreement spells out the consequences of dissolution or bankruptcy of a member. It also contains sections 8.7 and 8.8, concerning the resignation or termination of Roodenburg as general manager. (Further references to sections 8.7 and 8.8 are to the Operating Agreement.) Section 8.7 reads: "In the event Roodenburg dies or resigns as General Manager of the Company, then in that event, Pavestone shall purchase the Membership Interest of Hokanson for an amount equal to the Capital Account balance of Hokanson. The purchase price for the Membership Interest of Hokanson will be payable in cash in immediately available funds

at the closing which shall take place not later than thirty (30) days after the death or resignation of Roodenburg as General Manager of the Company, as the case may be. Any amounts not paid when due as set forth in this section, will bear interest at the rate of one and one-half percent (1½%) per month until paid."

Section 8.8 reads: "In the event Roodenburg is terminated as General Manager of the Company, or in the event Roodenburg objects to or disagrees with a decision of the Members which would affect the strategic direction, capital structure, fundamental operations, or relationships with vendors or customers of the Company, . . . Roodenburg may, on behalf of Hokanson, deliver written notice of such objection or disagreement to Pavestone and within thirty (30) days after receipt of such notice, Pavestone shall purchase the Membership Interest of Hokanson for an amount equal to the sum of (a) the Capital Account balance of Hokanson and (b) the then applicable Severance Payment . . . . The purchase of the Membership Interest of Hokanson, pursuant to this section[,] will be payable in cash in immediately available funds at the closing which shall take place not less than thirty (30) days after the occurrence of the event triggering the purchase pursuant to this section. Any amounts not paid when due as set forth in this section will bear interest at the rate of one and one-half percent (1½%) per month until paid."

Based on an inventory conducted on the property contributed by Hokanson to Pavestone California, the value of Hokanson's capital account was initially set at $1,118,875.

On November 30, 2001, Roodenburg sent Pavestone a letter explaining his disagreement with certain matters that had occurred with respect to the governance of Pavestone California. Roodenburg indicated he believed he had been constructively terminated as general manager of the company inasmuch as his authority over its operations had been severely limited. Roodenburg stated he accepted such termination. However, he further stated: "If you disagree with this conclusion, I hereby resign from my employment with Pavestone California on the grounds that I object and disagree with your decisions affecting the strategic direction, capital structure, fundamental operations and relationships with vendors or customers . . . . On December 3, Pavestone accepted Roodenburg's resignation.

On July 3, 2002, Pavestone provided plaintiffs an accounting of the amounts it determined were owed to them upon Roodenburg's resignation. Pavestone computed the value of Hokanson's capital account to be -$27,944. Adding in a severance payment of $400,000 and interest of $25,056.33, and subtracting certain offsets, Pavestone arrived at a figure of $263,688.05. Pavestone included with the accounting statement a check in this amount. Plaintiffs disagreed with Pavestone's calculations and returned the check.

Plaintiffs initiated this action against Pavestone, alleging five causes of action, including breach of contract,

breach of fiduciary duty, and accounting. The case went to trial on the breach of contract and breach of fiduciary duty claims alone. The jury returned a special verdict finding that, at the time of Roodenburg's resignation, the value of Hokanson's capital account was $143,040 and Roodenburg was entitled to severance of $400,000. The jury also found there had been no breach of fiduciary duty.

As noted above, the trial court entered judgment for plaintiffs in the amount of $543,040 plus interest of $489,550.56.

Both parties appeal.

DISCUSSION

I

Breach of Contract

Pavestone contends the trial court erred in entering judgment for plaintiffs on the breach of contract claim, inasmuch as the jury returned a special verdict finding there had been no breach of contract. Pavestone cites question Nos. 5 and 6 of the special verdict. Question No. 5 asked: "Did defendant Pavestone Co. breach the agreements by failing to pay or offering to pay an amount equal to or greater than the balance of the Hokanson capital account?" The jury answered in the negative. Question No. 6 asked: "Did defendant Pavestone Co. breach the agreements by failing to pay or offering to pay the severance payment, if any, after the resignation of plaintiff Frans Roodenburg?" Again, the jury answered no.

Pavestone argues that, in light of these findings, it is entitled to a defense verdict on the breach of contract cause of action.

Plaintiffs counter that the jury also found, on question Nos. 7 and 8, that the balance in the capital account and the amount of the severance on November 30, 2001, were $143,040 and $400,000 respectively. Plaintiffs argue that, assuming there was any confusion between the special verdicts on question Nos. 5 and 6, on the one hand, and question Nos. 7 and 8, on the other, such confusion was caused by Pavestone and, hence, Pavestone cannot be heard to complain. Plaintiffs point out that, after the jury returned its verdict, they attempted to obtain clarification from the jury but Pavestone objected and Pavestone thereafter agreed to entry of judgment in the amount of $543,040. Plaintiffs further argue, in any event, the trial court properly interpreted the special verdict to reach the jury's intent.

Pavestone replies it reserved the right to challenge the verdict on the breach of contract claim. According to Pavestone, there is no ambiguity in the special verdict, inasmuch as the jury clearly found no breach of contract, and hence there was no reason to seek further clarification. Pavestone further argues it immediately challenged the verdict after it was entered.

Because we agree with plaintiffs that the trial court properly interpreted the jury's verdict, we need not address the issue of forfeiture.

Question Nos. 5 and 6 were unclear. As described above, question No. 5 asked whether Pavestone breached the agreements "by failing to pay or offering to pay an amount equal to or greater than the balance of the Hokanson capital account?" Use of the word "offering" in this question, rather than "offer," creates the confusion. It is likely the parties intended that the jury be asked if Pavestone breached the agreements by failing either (1) to pay or (2) to offer to pay the amount owed. However, that is not what the question asked. Rather, it asked if Pavestone breached the agreements either (1) by failing to pay or (2) by offering to pay the amount owed. And since there was no evidence presented that Pavestone paid anything to plaintiffs, the question became whether Pavestone breached the agreements by offering to pay the amount owed. It is not surprising the jury answered such a question in the negative. Offering to pay the amount owed would not be a breach, but performance.

But even assuming the jury was able to discern the parties' intent, question No. 5 was further ambiguous in suggesting that Pavestone could avoid a breach by offering to pay "an amount" equal to or greater than the value of the capital account. The jury concluded the value of the capital account was $143,040. Since Pavestone offered to pay plaintiffs $263,688.05, this is "an amount" greater than the capital account. Nowhere did the question inform the jury it must first subtract the value of the severance payment from the amount offered by Pavestone in order

to determine if Pavestone offered an amount equal to or greater than the value of the capital account.

Question No. 6 was also ambiguous. It asked whether Pavestone breached the agreements "by failing to pay or offering to pay the severance payment, if any, after the resignation of plaintiff Frans Roodenburg?" Again, the question created confusion by its use of the word "offering" rather than "offer." There would be no breach in Pavestone "offering" to pay the severance payment. In any event, Pavestone did offer to pay the severance, inasmuch as the $400,000 amount was included in the calculation of the $263,688.05 offered to plaintiffs.

"'A verdict should be interpreted so as to uphold it and to give it the effect intended by the jury, as well as one consistent with the law and the evidence.'" (*All-West Design v. Boozer* (1986) 183 Cal.App.3d 1212, 1223, quoting 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 343, p. 343.)

Pavestone acknowledges plaintiffs are entitled to an amount equal to the value of Hokanson's capital account on the date 30 days after Roodenburg's resignation. Pavestone's president testified at trial that failure to pay the amount owed on the capital account would be a breach of the Operating Agreement. The jury concluded the value of the capital account was $143,040 and the severance was $400,000. Pavestone does not dispute these amounts. Nevertheless, Pavestone argues the jury's finding of no breach of contract in question Nos. 5 and 6 bars plaintiffs from recovering. Whatever the jury intended by its negative answers to question Nos. 5 and 6, that is not it. The

jury may have found no breach by virtue of Pavestone not paying or offering to pay the amounts in question. However, it cannot reasonably be argued the jury intended that plaintiffs receive nothing on their claim. We conclude the trial court properly interpreted the jury's verdict to find plaintiffs are entitled to judgment in the amount of $543,040.

II

Plaintiffs' Right to Prejudgment Interest

The trial court awarded plaintiffs prejudgment interest in the amount of $489,550.56. Pavestone contends this was error, because the amount owed on plaintiffs' breach of contract claim was uncertain until the jury reached its verdict. Pavestone cites Civil Code section 3287, subdivision (a), which reads in relevant part: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . . ." "The test for recovery of prejudgment interest under [Civil Code] section 3287, subdivision (a), is whether 'defendant actually know[s] the amount owed or from reasonably available information could the defendant have computed that amount.'" (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1789.) Pavestone argues the amount owed on plaintiffs' breach of contract claim was uncertain, inasmuch as the value of Hokanson's capital account required extensive calculation. Pavestone points out that plaintiffs asserted at trial the value

of the capital account was $622,748, yet the jury found the value to be only $143,040.

Plaintiffs counter that uncertainty in the amount of the judgment is irrelevant where, as here, interest is awarded pursuant to a provision of the contract. Plaintiffs further argue prejudgment interest is appropriate in any event, because the amount of damages was reasonably subject to calculation using information readily available to Pavestone.

We agree with plaintiffs that uncertainty in the amount of damages is not a bar to recovery of prejudgment interest under the circumstances of this case. Although Civil Code section 3287, subdivision (a), requires that the amount of damages be certain or capable of being made certain by calculation, that section does not apply where prejudgment interest is part of the contractual amount owed. None of the cases cited by Pavestone to support its contention that section 3287, subdivision (a), bars plaintiffs' recovery of prejudgment interest involved a contractual interest provision. (See, e.g., *Lineman v. Schmid* (1948) 32 Cal.2d 204; *Stein v. Southern Cal. Edison Co.* (1992) 7 Cal.App.4th 565; *Fireman's Fund Ins. Co. v. Allstate Ins. Co.* (1991) 234 Cal.App.3d 1154; *Chesapeake Industries v. Togova Enterprises* (1983) 149 Cal.App.3d 901; *Schmidt v. Waterford Winery* (1960) 177 Cal.App.2d 28; *Stockton Theatres, Inc. v. Palermo* (1953) 121 Cal.App.2d 616; *Minton v. Mitchell* (1928) 89 Cal.App. 361; *Williams v. Flinn & Treacy* (1923) 61 Cal.App. 352.) In *Schmidt*, *supra*, 177 Cal.App.2d at page 34, the court observed: "The general rule with respect to allowance of

interest, *when there is no contract to pay interest*, is that the law awards interest upon money from the time it becomes due and payable, if such time is certain and the sum is certain or can be made certain by calculation." (Italics added.)

In the present matter, the Operating Agreement contains two provisions requiring the payment of interest on the amount owed by Pavestone. Section 8.7 applies where Roodenburg dies or resigns as general manager and requires Pavestone to purchase Hokanson's interest in Pavestone California for the amount of Hokanson's capital account. Such purchase must take place no later than 30 days after the death or resignation. Section 8.7 further provides: "Any amounts not paid when due as set forth in this section, will bear interest at the rate of one and one-half percent (1½%) per month until paid."

Section 8.8 applies where Roodenburg is terminated as general manager or gives notice of disagreement with a strategic decision of the members, in which event Pavestone is obligated to purchase Hokanson's interest for the sum of Hokanson's capital account and a severance payment. Such purchase must take place no later than 30 days after termination or notice of disagreement. Section 8.8 contains an identical interest provision to that in section 8.7.

Under the express terms of the Operating Agreement, Pavestone is obligated to pay interest on any amount not paid within 30 days of a triggering event. Hence, plaintiffs need not resort to Civil Code section 3287, subdivision (a), to obtain prejudgment interest. The obligation to pay interest on

any amount ultimately determined to be owed is no less enforceable than the obligation to pay the value of the capital account or the severance payment.

III

Interest Rate

Pavestone contends the interest rate included in sections 8.7 and 8.8--18 percent per year--violates the usury provision of the California Constitution. Pavestone cites Article XV, section 1, which limits the amount that may be charged on "any loan or forbearance of any money, goods, or things in action" for other than personal, family or household purposes, to "the higher of (a) 10 percent per annum or (b) 5 percent per annum plus the rate prevailing on the 25th day of the month preceding the earlier of (i) the date of execution of the contract to make the loan or forbearance, or (ii) the date of making the loan or forbearance established by the Federal Reserve Bank of San Francisco on advances to member banks under Sections 13 and 13a of the Federal Reserve Act as now in effect or hereafter from time to time amended . . . ." (Cal. Const., art. XV, § 1, subd. (2).)

Pavestone contends the present matter involves a "forbearance" within the meaning of the foregoing provision. Pavestone reasons that, because the 18 percent interest rate was to begin to apply 30 days after the due date for payment, it is "simply an assessment made by [plaintiffs] for 'waiting to collect the debt' and therefore a 'forbearance' subject to

California usury laws." Pavestone argues a forbearance agreement may be made, as here, before the debt matures. According to Pavestone, the parties foresaw that the amount owed on the buyout of Hokanson's interest in Pavestone California would not be paid immediately and provided for the accrual of interest until that amount could be calculated and paid.

Plaintiffs counter that the Operating Agreement is not a forbearance agreement within the meaning of the State usury laws but a "purchase and sale contract." According to plaintiffs, the Operating Agreement does not provide for forbearance but rather has the opposite effect. It imposes a deadline on payment, i.e., 30 days after the triggering event. Further, sections 8.7 and 8.8 do not provide for repayment of a debt; they provide for the purchase of Hokanson's interest in Pavestone California.

Plaintiffs have the better argument. First, Pavestone does not even attempt to establish that an interest rate of 18 percent per year would violate the constitutional provision. This is simply assumed.

In any event, "[i]n determining whether a particular transaction is usurious, courts look to its substance rather than to its form. The key question is whether the transaction has as its true purpose the hire of money at an excessive interest rate." (*Sheehy v. Franchise Tax Bd.* (2000) 84 Cal.App.4th 280, 282-283 (*Sheehy*).) A "forbearance" has been defined as an agreement to extend the time for payment of an obligation. (*DCM Partners v. Smith* (1991) 228 Cal.App.3d 729,

735.) "A forbearance occurs when the creditor, in exchange for consideration, agrees to wait for a period of time to collect the debt. A forbearance may also occur in credit sale transactions, where the original note is modified to extend the period of payment." (*Sheehy*, at p. 284.) A forbearance agreement may be entered into before or after the original due date. (*DCM Partners*, at p. 735.)

In *DCM Partners v. Smith*, *supra*, 228 Cal.App.3d 729, the plaintiff purchased real property from the defendant in a credit sale, which included a promissory note bearing interest at a legal rate of 10 percent. However, when the plaintiff determined it could not pay the note when due, the defendant agreed to extend the note at an increased rate of 15 percent. (*Id.* at p. 732.) The court found the modification agreement to be a forbearance despite the fact the agreement was reached before the due date of the debt. However, the court went on to find no violation of the usury laws in light of the fact the original transaction was exempt as a purchase and sale agreement. (*Id.* at p. 737.)

In *Sheehy*, the defendant waited six years before enforcing a tax delinquency, and then charged the taxpayer interest at 10 percent compounded daily. The taxpayer brought this action claiming the interest violated the usury laws because the delay in enforcement was, in effect, a forbearance. The Court of Appeal disagreed, explaining: "Here, defendant's delay in informing plaintiffs of the amount due is not a forbearance. First, the interest assessment does not violate the purpose of

the usury laws. Interest is assessed on delinquent taxes, not to take advantage of the taxpayer, but to recover the loss of use of the tax money due. [Citation.] Furthermore, examining 'the substance of the transaction and not the form,' the true purpose of assessing interest on delinquent taxes over and above that allowed by California Constitution, article XV, section 1 is not 'the hire of money at an excessive rate of interest, but is a penalty assessment." (*Sheehy, supra,* 84 Cal.App.4th at p. 283.)

Examining the substance of the Operating Agreement, and in particular sections 8.7 and 8.8, it is readily clear this matter does not involve a forbearance. First and foremost, there was no agreement between the parties to extend payment of a debt. Plaintiffs never agreed to extend the time for Pavestone to pay the amounts required under sections 8.7 or 8.8. On the contrary, plaintiffs sued to enforce payment under those provisions. Furthermore, sections 8.7 and 8.8 did not extend an existing debt. Rather, those provisions created a new obligation, by requiring Pavestone to buy out plaintiffs' interest in Pavestone California.

As in *Sheehy*, the interest provisions in sections 8.7 and 8.8 were not imposed to take advantage of a debtor but to recover the loss of use of the money owed by Pavestone. Also as in *Sheehy*, the purpose of the interest provisions was not the hire of money for a profit but to impose a penalty in order to induce Pavestone to meet its obligation.

Because the interest provisions of sections 8.7 and 8.8 do not amount to a forbearance, those provisions are not subject to the constitutional usury limits.

Pavestone nevertheless contends the interest provisions amount to illegal penalties under Civil Code section 1671. Subdivision (b) of that section reads: "Except as provided in subdivision (c) [regarding consumer transactions and dwelling purchases], a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made."

Pavestone argues the unreasonableness of the 18 percent penalty was clear in January 2000, when the Operating Agreement was signed, and is clear today. Pavestone points out that in January 2000 the value of Hokanson's capital account was approximately $1.1 million and the severance would have been $500,000. Thus, if section 8.8 had been invoked at that time, Pavestone would have owed plaintiffs $1.6 million, and the 18 percent interest penalty would have amounted to $288,000 per year. Pavestone further points out the interest on the judgment reached in this matter is nearly as great as the judgment itself.

Pavestone's arguments miss the point. Obviously, the greater the amount Pavestone owed and the longer Pavestone failed to pay it, the more the interest penalty would be. Likewise, the more money withheld by Pavestone and the longer it

is withheld, the greater the harm to plaintiffs. The real issue here is not the magnitude of the interest charge but the rate used. In this regard, Pavestone makes no attempt to argue the 18 percent rate is unreasonable under the circumstances and presented no evidence to the trial court in this regard.

Pavestone argues plaintiffs failed to present any evidence of economic injury suffered as a result of the late payment. Nor did plaintiffs present any evidence of anticipated injury at the time the Operating Agreement was signed. However, plaintiffs had no burden to do so. "Civil Code section 1671, subdivision (b) states a presumption of validity of a liquidated damages clause, and places the burden on the party who seeks invalidation to show that 'the provision was unreasonable under the circumstances existing at the time the contract was made.' . . . [S]ubdivision (b) gives the parties considerable leeway in determining the damages for breach. All the circumstances existing at the time of the making of the contract are considered, including the relationship that the damages provided in the contract bear to the range of harm that reasonably could be anticipated at the time of the making of the contract.'" (C*alifornians for Population Stabilization v. Hewlett-Packard Co.* (1997) 58 Cal.App.4th 273, 288.)

Because Pavestone failed to satisfy its burden of establishing the 18 percent interest charge was an unreasonable estimate of the damages likely to be suffered by plaintiffs in the event of late payment, the trial court properly rejected Pavestone's claim under Civil Code section 1671.

IV

Breach of Fiduciary Duty

In their cross-appeal, plaintiffs contend the trial court erred in denying their motion for new trial on the breach of fiduciary duty claim. They argue the evidence presented in support of the motion demonstrated the jury applied the wrong legal standard in reaching its verdict and various members of the jury exerted undue pressure on one juror to change her vote. We find no irregularity in the proceedings.

In support of their motion for new trial, plaintiffs submitted the declarations of two jurors. Juror No. 7 stated she was the "swing vote" on the breach of fiduciary duty claim. She first voted no on whether there had been a breach, because she believed it was necessary to find, by clear and convincing evidence, that there had been fraud, malice or oppression on the part of Pavestone. This made the vote 9 to 3 against plaintiffs. However, juror No. 7 immediately changed her vote to yes, prompting "a lot of negative discussion" and causing one juror to say, "Oh now we're deadlocked." After several jurors said they just wanted to be done with the matter, the jury notified the court it was deadlocked.

After returning to court and discussing the matter with the judge, the jury resumed deliberations. Juror No. 7 described what followed: "During the further deliberations, a number of the jurors made comments that we just needed to have the question answered 'No' so that we would not have to continue

deliberating any further. What had been a negative discussion before talking with the judge turned much more negative and a lot of pressure was used by other jurors to get me to change my vote again. I became emotionally upset and I could feel tears welling up in my eyes. I felt terrible because I believed Mr. Roodenburg had been ruined, and [another juror] said, 'how could he be ruined, he has all these other companies.' Under the pressure, I finally did change my vote on Question Number 1 to a 'No' vote. I did not vote my conscience on this question, but I did so because I felt pressured to do so because the other jurors that voted 'No' didn't want to deliberate anymore. I regret that decision and feel that an injustice has been done because I changed my vote, when I do believe in my heart that Question No. 1 should have been answered 'Yes.' I felt then, and still feel now, that it should have been a 'Yes' even under the clear and convincing standard of proof for fraud, malice and oppression as given in the instructions."

Much of the foregoing was confirmed in the declaration of juror No. 3. However, juror No. 3 stated the original vote was 9 to 3 *in favor of* plaintiffs rather than against plaintiffs, as juror No. 7 indicated. The vote later changed to 8 to 4 against plaintiffs following some discussions about a breach of fiduciary duty requiring proof of fraud, malice or oppression by clear and convincing evidence. Juror No. 3 confirmed that pressure was put on juror No. 7 to change her vote, and juror No. 7 "placed her hands in her face and finally said, 'I'll change my vote so we can all go.'" Juror No. 7 later told juror

No. 3 she was uncomfortable with her vote but did so only so everybody could go home. Finally, juror No. 3 said two other jurors told her they changed their vote to no because of the malice issue.

Pavestone objected to the foregoing declarations with the exception of two paragraphs in the declaration of juror No. 3--paragraphs 4 and 8. In paragraph 4, juror No. 3 stated the initial vote on the breach of fiduciary duty claim was 9 to 3 in favor of plaintiffs. In paragraph 8, juror No. 3 stated: "When I was asked about changing my vote, after the deadlock, I told them there was no way I was going to change my vote just because people wanted to leave. I said, if they could show me evidence to convince me to change my vote, I would, but I wouldn't do it just so everyone could go home. This came up because several jurors were saying about how the vote should just be 'No' so we could all leave."

The trial court sustained the objections to the juror declarations.

Plaintiffs contend the court erred in this regard, because juror declarations may be used to establish "objectively ascertainable statements, conduct, conditions or events." Plaintiffs argue much of the declarations concerned statements made by jurors that "are overt acts which can be used to impeach a verdict." Plaintiffs further argue those statements are not inadmissible hearsay, because the fact in issue is what was said, not whether what was said was true. Further, plaintiffs argue, the statements qualify under an exception to the hearsay

rule for statements offered to explain, qualify or make understandable conduct of the declarant. (See Evid. Code, § 1241.)

Evidence Code section 1150 (hereafter section 1150), subdivision (a), reads: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

In *People v. Hutchinson* (1969) 71 Cal.2d 342 (*Hutchinson*), the California Supreme Court explained section 1150 distinguishes between "proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved." (*Hutchinson*, at p. 349.) According to the court, "[t]he only improper influences that may be proved under section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration." (*Id.* at p. 350.) In *Hutchinson*, the court concluded affidavits reciting statements made to the jury by the bailiff, which were likely to have influenced the verdict, were admissible.

In *Krouse v. Graham* (1977) 19 Cal.3d 59 (*Krouse*), the court concluded affidavits suggesting the jurors had discussed adding attorney fees to the award, where such fees were not recoverable, and further suggesting an agreement had been reached to this effect should have been admitted. (*Id.* at pp. 80-82.) However, the court also noted that, to the extent the affidavits indicated the jury considered certain matters in arriving at its verdict, this would concern the mental processes of the jurors and would not be admissible. (*Id.* at p. 81.)

The declarations submitted by plaintiffs here suggest two types of misconduct: (1) use of the wrong legal standard for finding breach of fiduciary duty, and (2) undue pressure on juror No. 7. Regarding the first, the declarations contain references to both statements made by jurors about the proper legal standard and descriptions of the legal standard actually applied by the jurors. Arguably, statements made by jurors about the appropriate legal standard are overt acts that are objectively verifiable and, hence, admissible. However, absent an actual agreement to use the wrong standard, statements regarding the jurors' reasoning process would not be admissible. (*Hutchinson*, *supra*, 71 Cal.2d at pp. 349-350.) As for descriptions of undue pressure exerted on juror No. 7, here too we have overt acts that are objectively verifiable as well as descriptions of the mental process utilized by juror No. 7.

Regarding the first type of potential misconduct, use of the wrong legal standard, the cases have distinguished between an actual agreement to use the wrong standard, as in *Krouse*, and

"deliberative error" where, without a particular agreement, the jurors simply misconstrue the court's instructions.

For example, in *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677 (*Mesecher*), juror statements indicated that, during deliberations, the jurors defined "battery" as "contact which is intentional *or* unlawful *or* harmful *or* offensive" (*id.* at p. 1682), a definition that conflicted with the court's instructions. The juror statements further indicated a majority of the jurors relied upon the erroneous definition in reaching their verdict. (*Id.* at pp. 1682-1683.)

The Court of Appeal concluded the juror statements were not admissible, explaining: "While 'jurors may testify to "overt acts"--that is, such statements, conduct, conditions, or events as are "open to sight, hearing, and the other senses and thus subject to corroboration"--[they] may not testify to "the subjective reasoning processes of the individual juror . . . ." [Citation.]' [Citations.] Likewise, evidence about a jury's 'subjective *collective* mental process purporting to show *how* the verdict was reached' is inadmissible to impeach a jury verdict. [Citation.] Thus, juror declarations are inadmissible where, as here, they 'at most suggest "deliberative error" in the jury's collective mental process--confusion, misunderstanding, and misinterpretation of the law.'" (*Mesecher, supra,* 9 Cal.App.4th at p. 1683, fn. omitted.)

In *Ford v. Bennacka* (1990) 226 Cal.App.3d 330 (*Ford*), the jury returned a verdict finding the defendant was not negligent in connection with a motorcycle accident. The plaintiff filed a

motion for new trial supported by declarations from five jurors asserting the jury confused the concepts of comparative negligence and preponderance of the evidence. (*Id.* at pp. 331-332.) One juror in particular stated: "'We all agreed that if the Defendants had been more negligent than Plaintiffs [*sic*], we could and would have given the verdict to the Plaintiff.'" (*Id.* at p. 332, fn. 1.)

The Court of Appeal concluded the juror statements were properly excluded, explaining: "The juror declarations proffered here do not meet the standards required by statute and case law. The declarations lack objective and verifiable incidents of juror misconduct. [Citations.] The declarations do not suggest any juror violated the court's instruction to follow the law by recounting his or her own outside experience on a question of law. [Citations.] The declarations do not describe overt acts, statements, or conduct showing the jury intentionally agreed to disregard applicable law and apply inapplicable law. [Citation.] Instead, the declarations at most suggest 'deliberative error' in the jury's collective mental process--confusion, misunderstanding, and misinterpretation of the law." (*Ford*, *supra*, 226 Cal.App.3d at pp. 335-336.)

Despite the fact the juror declarations recited statements made by jurors during deliberations, which statements would be objectively verifiable, the court concluded their admission would contravene the purpose of section 1150. According to the court: "Section 1150 'does not envision a procedure whereby a

trial judge, as a result of a claim of jury misconduct, reviews a "replay" of the particular language used by various jurors as they deliberated and makes a subjective determination of its propriety. Such a procedure would be too great an extension of the court's limited authority to invade the traditionally inviolate nature of the jury proceedings.' [Citation.] 'If there is one thing which is clear from the language of Evidence Code section 1150 and the case law dealing with the subject, it is that the mental processes of the jurors are beyond the hindsight probing of the trial court.' [Citation.] [¶] 'In spite of the perception that, in recent times, the law concerning the ability of jurors to impeach a verdict has been liberalized, the process must be carefully scrutinized and controlled.' [Citation.] 'In cases of a "deliberative error" which appears to produce a mistaken or erroneous verdict, the result has almost invariably been to bar impeachment of the verdict.' [Citation.]" (*Ford*, *supra*, 226 Cal.App.3d at pp. 333-334, fn. omitted.)

In the present matter, all the discussions reflected in the juror affidavits regarding use of an improper legal standard for determining a breach of fiduciary duty relate to deliberative error that may well have produced an erroneous result. There were no outside influences that may have contributed to the juror's misconception of the proper legal standard and there was no agreement to apply the wrong standard. Statements made by jurors about the proper standard that reflect a misunderstanding of the law have relevance only to the extent they demonstrate

the jury in turn applied the wrong standard. Thus, in order to maintain the integrity and openness of the deliberative process, the trial court properly excluded those portions of the juror affidavits.

As for the pressure exerted on juror No. 7 to change her vote, here too we have overt acts that are objectively verifiable but that also go to the mental process utilized by juror No. 7 to reach her decision. Pavestone argues the statements made by other jurors that pressured juror No. 7 to change her vote were not admissible, because their only relevance is in the impact those statements had on juror No. 7's thought processes. However, this same argument can be made about any overt act that comes before the jury improperly, such as the statements by the bailiff in *Hutchinson*, or the juror's agreement to add attorney fees to the award in *Krouse*. It is only the effect those matters have on the jurors that make them relevant.

Thus, the question is not whether the conduct in question goes to the jurors' mental processes. Clearly, statements made by one juror mischaracterizing the standard for finding a battery, as in *Mesecher*, could influence the thought processes of other jurors who heard it. Similarly, statements by one juror suggesting that one party could recover for negligence only if he or she was less negligent than the other party, as in *Ford*, could influence the thought processes of the other jurors.

The real question is whether the conduct in question is the type we must accept, even if it leads to an erroneous verdict,

in order to protect the integrity of the jury process. As the court stated in *Mesecher*, *supra*, 9 Cal.App.4th at pages 1683-1684: "County attempts to avoid the impact of these rules by focusing on the fact that several of the jurors *communicated* their misunderstanding of the instructions during deliberations. However, '[t]he subjective quality of one juror's reasoning is not purged by the fact that another juror heard and remembers the verbalization of that reasoning.' To hold otherwise would destroy the rule . . . which clearly prohibits the upsetting of a jury verdict by assailing these subjective mental processes. It would also inhibit and restrict the free exchange of ideas during the jury's deliberations."

In *People v. Orchard* (1971) 17 Cal.App.3d 568, a defense motion for new trial was supported by an affidavit indicating the jury foreman had chastised one of the jurors during deliberations, and this "'so embarrassed and humiliated [her] in front of the other members of the jury that she voted "guilty" on the next ballot rather than be subjected to the domination and coercion of the foreman.'" (*Id.* at p. 572, fn. 1.) The Court of Appeal rejected any reference in the affidavit to the effect of the foreman's conduct on the other juror, inasmuch as this went to the mental processes of the jurors. The court also rejected the remainder of the affidavit, concluding it did no more than describe an interchange between jurors. According to the court: "To permit inquiry as to the validity of a verdict based upon the demeanor, eccentricities or personalities of

individual jurors would deprive the jury room of its inherent quality of free expression." (*Id.* at p. 574.)

In *People v. Cox* (1991) 53 Cal.3d 618, juror declarations indicated that the jury was told not to smoke during deliberations but certain jurors ignored the admonition and did so, "'causing some jurors to be intimidated and change their votes.'" (*Id.* at p. 693.) The declarations also indicated: "'At one point the jury was hung seven for death and five for life; and one of the jurors for death told the life jurors that if they held out the jury would be locked up for three weeks; and this influenced some of the jurors to change their votes.'" (*Ibid.*) Applying the principles enunciated in *Hutchinson*, the court rejected the proffered evidence, explaining: "[W]e must reject the allegations of misconduct predicated on the intimidation of nonsmoking jurors and the expressed desire of some jurors to resolve the penalty and avoid prolonged deliberations, to the extent they clearly implicate 'fellow jurors' mental processes or reasons for assent or dissent.'" (*Cox*, at pp. 694-695.) The court continued: "[W]e are precluded from considering any matters concerning the jurors' ratiocinations. Thus, while the *conduct* of jurors disregarding an agreement on smoking or complaining about the pace of deliberations may be scrutinized, the *effect* of this conduct on subsequent votes may not be. When we exclude the latter, the former, standing alone, does not implicate juror misconduct; nor does the record otherwise demonstrate that some members of the jury were prevented from freely expressing their views because

of these two circumstances. Accordingly, these allegations would not sustain defendant's motion for a new trial." (*Id.* at p. 695.)

In *People v. Keenan* (1988) 46 Cal.3d 478, one juror lost his temper in the course of deliberations, pointed his finger at another juror, an elderly woman who was the lone holdout against death, and said, "'If you make this all for nothing, if you say we sat here for nothing, I'll kill you and there'll be another defendant out there--it'll be me.'" (*Id.* at p. 540.) According to the jury foreman, the holdout juror "began crying and shaking and went to the bathroom 'where I believe she vomited.'" (*Ibid.*) The Supreme Court found no prejudicial misconduct under these circumstances, explaining: "Even if the described 'threat' occurred, we must conclude as a matter of law that it was not prejudicial misconduct which impeaches the verdict. The outburst . . . was particularly harsh and inappropriate, but as the trial court suggested, no reasonable juror could have taken it literally. Manifestly, the alleged 'death threat' was but an expression of frustration, temper, and strong conviction against the contrary views of another panelist." (*Id.* at p. 541.)

While we might scrutinize the comments made by other jurors that influenced juror No. 7 to change her vote, we may not consider the impact of those statements on the juror. And the comments standing alone do not amount to jury misconduct. Thus, even if those portions of the juror declarations describing comments made to juror No. 7 about her need to vote no so they could all go home were admissible, they do not establish

misconduct. Rather, they are part of the normal give and take of jury deliberations. That some jurors may have stronger wills while others may be easily intimidated is an inherent part of human nature that must be accepted if we are to continue to rely on juries to resolve legal disputes. "If transient comments made in the heat of discussion during deliberations become a potential vehicle for attacking the verdict of the jury, freedom of discussion in the jury room is chilled, and the free exchange of ideas is inhibited." (*Tillery v. Richland* (1984) 158 Cal.App.3d 957, 977.) We conclude any portions of the juror declarations that should have been admitted did not establish jury misconduct, and the trial court properly denied plaintiffs' motion for new trial.

V

Compound Interest

Plaintiffs contend the trial court erred in failing to award compound interest. Section 8.8 states that, upon a triggering event, "Pavestone shall purchase the Membership Interest of Hokanson for an amount equal to the sum of (a) the Capital Account balance of Hokanson and (b) the then applicable Severance Payment." Such purchase shall take place "not less than thirty (30) days after the occurrence of the event triggering the purchase." Section 8.8 further provides: "*Any amounts* not paid when due as set forth in this section will bear interest at the rate of one and one-half percent (1½%) per month until paid." (Italics added.)

Plaintiffs argue use of the plural "amounts" in the last sentence signifies an intent that unpaid interest be included in the amounts on which interest is imposed. According to plaintiffs, if the drafters had intended that interest be due only on the principal amount not paid, they would have said "the amount" or "the principal amount" rather than "[a]ny amounts."

In *Page v. Williams* (1880) 54 Cal. 562 (*Page*), the note in question contained the following provision: "'With interest at 2 per cent. per month; interest payable monthly, and if not paid to become part of the principal.'" (*Id.* at p. 563.) The Supreme Court concluded this provision required the payment of interest compounded monthly. (*Id.* at pp. 564-565.)

Plaintiffs argue the language of the provision in *Page* cannot be distinguished from that in section 8.8. In particular, plaintiffs argue the language of the provision providing for monthly interest to be added to the principal is "[t]he same type of language" utilized in the Operating Agreement. We disagree. The only similarity between the provision in *Page* and that in the instant matter is the reference to monthly rather than annual interest. However, whether monthly or annual, the question remains whether the interest not paid is to be added to the principal for purposes of future interest. In *Page*, this was expressly provided. Not so here. The use of a monthly assessment rather than an annual one merely goes to the frequency of compounding *if compounding is to be allowed*.

Plaintiffs further argue the language of section 8.8 "is virtually indistinguishable" from that in *Firestone v. Hoffman* (2006) 140 Cal.App.4th 1408 (*Firestone*). In *Firestone*, the note provided for interest on the outstanding principal "'at the rate of Seven and one-half percent (7.5%) per annum'" payable on July 31, 1997. (*Id.* at pp. 1410-1411.) It further provided that "'[a]ll principal *and interest* not paid when due shall bear interest from such date until paid in full at a rate equal to the Federal short-term rate determined pursuant to section 1274(d) of the Internal Revenue Code of 1986 . . . .'" (*Id.* at p. 1411, italics added.)

It is at once obvious that the language of the provision in *Firestone* is not "virtually indistinguishable" from that in section 8.8. On the contrary, the provision in *Firestone* expressly stated that any interest not paid would itself bear interest. In section 8.8, this result can be reached only if one interprets "[a]ny amounts" to include both principal and interest.

At any rate, plaintiffs misstate the holding in *Firestone*. Plaintiffs argue: "The defendant Hoffman argued that this provision only authorized simple interest. But the trial court disagreed and awarded compound interest. [Citation.] This finding was affirmed on appeal." The Court of Appeal made no such finding. It is true the defendant in *Firestone* argued for simple interest and the trial court rejected that argument and awarded compound interest. (*Firestone*, *supra*, 140 Cal.App.4th at p. 1417.) However, the issue considered in the published

portion of the appellate opinion related to the admissibility of evidence. There is no discussion whatsoever of the propriety of awarding compound interest. Furthermore, the decision of the *Firestone* court was to reverse, rather than affirm, the judgment. (*Id.* at p. 1421.)

"[T]he compounding of interest has never been looked upon with favor in this state." (*Robertson v. Dodson* (1942) 54 Cal.App.2d 661, 665.) As a general rule, "compound interest is not to be allowed in the absence of a showing that such was clearly the agreement of the parties." (*Fuller v. White* (1948) 33 Cal.2d 236, 240.)

In our view, section 8.8 does not clearly express an agreement to allow compound interest. Although the section imposes interest on "[a]ny amounts" not paid when due, it does not mention the imposition of interest on interest. Use of the plural may signify nothing more than loose drafting. In *Page*, the provision expressly stated interest would be added to principal. In *Firestone*, the provision expressly stated both principal and interest would bear interest. Section 8.8 contains no such reference to interest. Absent a clear showing of a contrary intent, we conclude the trial court properly determined section 8.8 does not call for compound interest and correctly refused to award it.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

HULL, J.

We concur:

SIMS, Acting P. J.

BUTZ, J.